poses. Here the courts have gone at the matter from every conceivable angle. Though logically the more important problem, practically this is of less consequence. Whatever test a court applies on this point, whether legislation will be upheld or overthrown depends primarily upon the court's attitude on the first problem. The opposite results on the question of fuel yards obtained in Maine and Massachusetts, which have substantially the same test upon the second problem, afford an instance of this.

Since the precise test is of secondary importance, a summary classification of the principal tests used will be sufficient. The orthodox test in the nineteenth century, as might be expected, was the historical one; public purpose was determined by the usage of the past.[9] In the present century the economic test has come into prominence, and stress is laid on the maintenance of private industrial enterprise.[10] A variant of this is the test of virtual monopoly, government ownership being allowed if the field is already closed to competition.[11] At all times courts are found which attempt to analyze the essential functions of government, and reject taxation for any purposes which are not embraced in these functions.[12] Another method is by analogy; under this test a municipal ice plant was upheld, because water supply is an admittedly proper purpose, and ice is nothing but congealed water![13] A very elastic test is to see whether the purpose falls within the "police power," which test has been held to be satisfied by state warehouses for cotton.[14]

A court must be very confident of its position before it can declare that the legislature has overstepped the limits of its discretion. The conflicting nature of the tests attempted upon the second problem should raise serious doubt in the mind of any court as to the entire accuracy of its own particular method. Hence it would seem advisable to give to the legislature's determination that degree of weight accorded by the more liberal among the courts.

RECENT CASES

ABATEMENT AND REVIVAL — ACTION *EX DELICTO* ABATES ON DEATH OF TORTFEASOR. — The defendant in an action for wrongful death died before the termination of the suit. A motion was made for an order to receive the action against defendant's administrator. *Held*, that the motion be denied. *Clough* v. *Gardiner*, 182 N. Y. Supp. 803.

The authorities are unanimous in supporting the principal case on the proposition that a cause of action for wrongful death will, in the absence of a statute,

[9] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655 (1874); People *v.* Salem, 20 Mich. 452, 4 Am. Rep. 400 (1870).

[10] Opinion of the Justices, 211 Mass. 624, *supra*.

[11] See Bruce Wyman, "Public Callings and the Trust Problem," 17 HARV. L. REV. 217, 219.

[12] State *v.* Osawkee Township, 14 Kan. 418, 19 Am. Rep. 99 (1875); Opinion of the Justices, 182 Mass. 605, 66 N. E. 25 (1903).

[13] Holton *v.* Camilla, 134 Ga. 560, 68 S. E. 472 (1910).

[14] State *v.* Warehouse Commission, 92 S. C. 81, 75 S. E. 392 (1912). The court expressly held the statute to be a police regulation in general scope, although inoperative because of certain defects.

abate with the death of the wrongdoer. *Clark* v. *Goodwin*, 170 Cal. 527, 150 Pac. 357; *Bates* v. *Sylvester*, 205 Mo. 493, 104 S. W. 73. That this rule of the common law reaches an undesirable result is obvious, and it has been generally corrected by statute. It is therefore interesting to note that in as important a jurisdiction as New York the defect in the common law has not yet been remedied by proper legislation.

ADMISSIONS — BY CONDUCT — SILENCE WHEN ACCUSED OF CRIME WHILE UNDER ARREST — ADMISSIBILITY AS SUPPORTING EVIDENCE. — The defendant was convicted of robbery on the testimony of an eleven-year-old boy and proof that while under arrest he had been directly accused of the crime and had said nothing. The only other evidence was independent proof of the robbery. By statute, the boy's testimony could not convict if unsupported by other evidence. *Held*, that proof of the defendant's silence under the circumstances was supporting evidence. *People* v. *Cascia*, 181 N. Y. Supp. 855.

For a discussion of this case see NOTES, p. 205, *supra*.

BANKRUPTCY — BANKRUPTCY ACT OF 1898 AND AMENDMENTS — §§ 38 (4), 70 E, AND GEN. ORD. XII. — Herbert Weidhorn, having been adjudged bankrupt, his case was referred to a referee. The trustee in bankruptcy thereafter filed with the referee a bill in equity, seeking to set aside alleged fraudulent transfers of chattels by the bankrupt to Leo Weidhorn, the present petitioner. The referee took jurisdiction and gave a decree on the merits in favor of the trustee. *Held*, that the referee had no jurisdiction. *Weidhorn* v. *Levy*, U. S. Sup. Ct., Oct. Term, 1919, No. 203.

A referee acquires only so much of the District Court's bankruptcy jurisdiction as the order of reference carries. See GENERAL ORDER XII (1), BANKRUPTCY ACT OF 1898, 5 U. S. S. A. 421. Upon unlimited reference, referees have assumed jurisdiction over proceedings in equity originally instituted before them. *In re Murphy*, 3 Am. B. R. 499; *Matter of O'Brien*, 21 Am. B. R. 11. But courts and text-books commonly deny such jurisdiction. *In re Walsh Bros.*, 163 Fed. 352; *In re Overholzer*, 23 Am. B. R. 10; see REMINGTON, BANKRUPTCY, 2 ed., § 545. And a court has only affirmed a referee's decree in such proceedings, the parties not having disputed the jurisdiction, "with great doubt." *In re Steuer*, 104 Fed. 976. The Bankruptcy Act is not uniformly construed. Under GENERAL ORDER XII (1), "all the proceedings," except those reserved to the judge, "shall be had before the referee." The District Court holds a trustee's suit against a transferee not included in these proceedings. *In re Weidhorn*, 243 Fed. 756. The Circuit Court infers inclusion from no specific exclusion in GENERAL ORDER XII (3) and § 38 (4); and, reading "any court of bankruptcy," in which a trustee is authorized by § 70 *e* to sue a transferee, in the doubtful light of § 1 (7) — "court of bankruptcy . . . may include the referee" — concludes the referee has jurisdiction. *In re Weidhorn*, 253 Fed. 28. This conclusion inevitably produces the anomaly of an appointed referee, acting not as a master with rather full powers, but as an original court. Surely it is more expedient to accelerate justice by creating more judges than by forming new tribunals.

BANKRUPTCY — DISCHARGE — EFFECT OF FALSE STATEMENTS MADE BY BANKRUPT IN ORDER TO OBTAIN BANK LICENSE. — The bankrupt a few weeks before bankruptcy secured a license to continue business as a banker by a materially false statement in writing to the State Comptroller. The bankrupt thereafter in the course of his business received deposits from his customers. The 1903 amendment of the Bankruptcy Act provides that the bankrupt shall be discharged unless he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the